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Supreme Court of the United States

October Term, 1923. No. 83.

CAMPBELL & STUART, INC.,

Appellee,

against

Steamship "GUL DJEMAL", her engines, boilers, etc.,
HUSSEIN LUTFI BEY, Master,

Appellant.

BRIEF FOR THE APPELLANT.

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SUPREME COURT OF THE UNITED STATES

CAMPBELL & STUART, INC., Appellee, *against* Steamship "GUL DJEMAL", her engines, boilers, etc., HUSSEIN LUTFI BEY, Master, Appellant.	October Term 1923 No. 83

BRIEF FOR THE APPELLANT.

Statement.

Hussein Lutfi Bey, "as Master of the *S. S. Gul Djemal*, owned, manned, operated by and in the possession of the Turkish or Ottoman Government, appearing herein for the interests of the Turkish or Ottoman Government, owner of the *S. S. Gul Djemal* and specially for the purpose of claiming immunity and for no other purpose," (Record, pp. 45, 46; fols. 134, 137), appeals from a final decree of the United States District Court for the Southern District of New York, directed by Hon. John C. Knox, D.J., adjudging that libellant recover damages in the sum of $375.50 with interest and costs (Rec., p. 43; fols. 128, 133).

The certificate of the District Judge made under §238 of Judicial Code states (Record, p. 48; fols. 143-147):

> "The sole question raised by the answer of the claimant herein, and the sole issue before this Court, was the jurisdiction of the Court over the steamship *Gul Djemal*, a vessel owned, manned, operated by and in the possession of the sovereign government of Turkey, at peace with the Government of the United States of America."

I. *The Facts in This Case Were Stipulated* (pp. 34, 38; fols. 102, 114).

The vital facts as agreed are summarized briefly:

The *S. S. Gul Djemal* when arrested and at all times referred to in the libel was a naval transport "owned by the Turkish or Ottoman Government" in its possession and flying its one flag (Ib., fols. 104, 105). When not in use as a transport, she, like others, was used in trade by the Seire Seffain, the third Division of Marine in charge of the transport service, with which she was registered.

The head of that Division was always a military or naval officer and was at said times a colonel, who in respect of the *Gul Djemal* was not acting in a military or naval capacity (fol. 107). The *Gul Djemal* came to the port of New York in the control and custody of her master, a Turkish naval officer on the reserve list. The officer second in command was a naval officer on the active list. *All other officers* and the crew were civilians *paid from the Turkish Government's Treasury;* but during this voyage were "not performing any naval or military functions", although subject to any orders from the department of the Turkish Government charged with naval or military affairs (Ib. par. Second; fols. 108, 110).

At all said times the *Gul Djemal* was—

> "engaged in commercial trade under charter for one round voyage to George Dedeoglou, who engaged to

carry passengers and goods for hire; and in such trade she (the *Gul Djemal*) was not functioning in a naval or military capacity. There was nothing of a naval or military character connected with her voyage from Constantinople to New York and return" (Ib. par. Third; p. 37; fols. 110, 111).

Prior to said times the Turkish Government had severed diplomatic relations with the United States; nevertheless "advising her peoples by proclamation that American institutions should not be molested but should be treated as heretofore". Diplomatic relations have not been resumed; but unofficial relations have been maintained by the United States through American consular representatives and a High Commissioner; the Spanish Ambassador in the United States representing Turkish interests, and being recognized in that capacity by our State Department (Ib. par. Fourth; pp. 37, 38; fols. 111-113).

The two governments are sovereigns and were at all times at peace, although Turkey was "an ally of the enemy of the United States in the World War" (Ib. p. 38; fol. 113).

So far as the stipulation accords with current history and the position of the United States Department of State, its facts are those of which, "The Court is bound to take judicial notice and for information as to which it may consult the Department."

Underhill v. *Hernandez*, 168 U. S. 250; 253.

The learned district judge on the stipulated facts held that the vessel was not immune from process for two reasons:

1) When arrested the vessel was, although owned, manned by and in the possession of the sovereign government of Turkey, engaged in commercial trade, under charter for hire to a private trader.

2) Diplomatic relations between the United States and Turkey were then severed and no appropriate suggestion was filed from the State Department of the United States. (Certificate, *supra,* at fol. 146); or as differently phrased in the opinion (fol. 126) because owing to the severance of diplomatic relations, *"the comity and courtesy due from this country to Turkey did not, in the absence of appropriate suggestion from the State Department of this Government, require the extension of such immunity"* (fol. 126, our italics).

Appellant submits respectfully that these reasons are not sound and therefore that the decree should be reversed.

2. *Previous Steps in Cognate Case in this Court.*

Before we discuss the reasons for a reversal, the Court should be reminded of previous steps taken before it.

On December 16th, 1920, in the port of New York, the vessel was attached (Ib. p. 9; fol. 25). Two applications have been made to this Court on her behalf for writs of prohibition and mandamus and denied. Neither application was in this suit.

Re Hussein Lutfi Bey, 254 U. S. 619.
Re Hussein Lutfi Bey, 256 U. S. 616.

The first petition was denied without opinion.

The second was denied in an opinion by Mr. Justice Van Devanter, which recognized that the questions involved were "important and also new"; but, held that as they were debateable and the allowance of the writs of prohibition was discretionary, the application should be denied.

The records on both applications are fully set forth in the one filed on the second (256 U. S. 616). They show

the efforts made by the Spanish Ambassador, representing Turkish interests here, pursuant to his sovereign's cabled instructions, to aid the vessel, and the attitude of the State Department at that time.

On the former application, the Ambassador—in accord with the procedure as then understood by certain eminent counsel and some judges—suggested the transport's ownership directly to the Court and asked her release, accompanying the suggestion with the State Department's certificate that he was duly accredited by his sovereign (pp. 45, 47 of the record in 256 U. S. 616). Also in reply to his letter (Ib. p. 68) the Department recognized that he represented Turkish interests and that there had been no declaration of war between Turkey and the United States, but preferred to refrain at that time from discussing the status of treaties (Ib. pp. 70, 71; cf. Department's letter to appellant's counsel, Ib. p. 63).

The decision in *Ex Parte Muir*, 254 U. S. 522, appearing at that time indicated that direct suggestions to the Court by diplomatic officers were not "appropriate" procedures; and accordingly, on February 14th, 1921, the Spanish Ambassador suggested to the State Department that it suggest to the Attorney General that the latter ask the vessel's release (Ib. 105, 106). The Department replied saying, among other things:

> "The Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this government in private litigation, even though such litigation may in some way involve merchant vessels owned by a foreign government. I therefore regret to say that the Department, in the light of the information before it, does not feel that it is in a position to take the action which you suggest." (Ib., p. 107; fols. 321, 322).

Appellant submits that the *Gul Djemal* being, in her main and general function, not a "merchant vessel" but a naval transport, her seizure was scarcely a "private litigation". If so, *The Maipo, The Carlo Poma, The Pampa, The Parlement Belge* and other cases, *infra,* were also such litigations.

However that may be, the rule enunciated by the State Department being one of general policy, the Spanish Ambassador could scarcely repeat his request; and, in the absence of a diplomatic representative of its own, the Turkish Government had no other way of presenting to the Court the facts than by the master's special appearance to protest against the Court's assumption of jurisdiction.

As master in possession and control of the vessel, he represented the sovereign owner, and moreover, as admittedly an officer in the Turkish navy, he was duly accredited by his commission.

The Santissima Trinidad, 7 Wheat. 283.

3. *Appellant's Special Appearance to Deny Jurisdiction.*

On January 26th, 1921, the Court allowed appellant, as master of the ship,—

> "*appearing specially for the purpose of objecting to the jurisdiction of the Court and to the arrest of the steamship* GUL DJEMAL, *and for no other purpose* * * * on the ground that the steamship is immune because she is, and at the time of her arrest under process herein was, in the possession of and owned by the Turkish Government,"

to file a claim and exceptions, a special plea in abatement, without stipulation or security for costs; giving libellant seven days within which to challenge the truth of the alleged facts (present record, pp. 10, 11; fols. 30, 31, our italics.)

On January 26th, 1921, the appellant still appearing specially, filed the special claim, exception to the writ and plea in abatement (p. 13).

On February 10th, 1921, libellant, in turn, filed an exceptive allegation, *traversing no fact, but alleging only one ground of exception, that the Turkish Government before the libel's filing had severed diplomatic relations with the United States, which relations had not been renewed;* wherefore it alleged the vessel was not immune; and prayed dismissal of the special claim, the exception to the writ and plea in abatement (pp. 17, 18; our italics). On the next day special claimant's proctors noticed a motion for the ship's release (p. 19), which, on *February 19th, 1921,* the Court denied, sustaining libellant's exception (p. 21; fol. 65).

4. *The Stipulation for Value Reserved the Claim for Immunity.*

Thereafter, *on April 25th, 1921,* the appellant and the Indemnity Insurance Company of North America executed and with leave of Court filed a stipulation for value approved by libellant's proctors in which the claim of immunity was reserved (p. 23 seq.).

The stipulation recites the master's special appearance for the sole purpose of claiming immunity, and the Company's consent to meet the claim unless it is *finally decided that the ship is immune,* or *in case she is found not immune to file a "general claim for the defense of this suit."* It also contained this proviso,—

> "Provided nothing in this clause contained to be construed as preventing the special claimant from insisting upon the immunity of the said steamship *up to such time as the immunity question herein shall have been decided by this Court* (i. e. District Court) and/or by any Appellate Court and/or by the *Supreme Court by a final decree* (p. 24; fol. 72, our italics).

The *condition* of this bond or stipulation for value reads as follows:

> "Now, Therefore, the condition of this stipulation is such that (1) *if the steamship* GUL DJEMAL *is finally held to be immune from process of this Court by this Court and/or by any Appellate Court and/or by the Supreme Court of the United States,* (2) or if the special claimant herein and the Indemnity Insurance Company of North America, having an office and principal place of business at No. 22 William St., Borough of Manhattan, in the City of New York, the undersigned hereon, abide by all the orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court, if an appeal intervene, with interest, then this stipulation to be void, otherwise to remain in full force and virtue." (Record, p. 25; fol. 73).

Thus not only is this stipulation for value on its face a denial of, and a protest against the assumption of jurisdiction owing to the foreign government's ownership and possession of the vessel, and also an agreement by the approval of libellants' proctors, that the security should be in all legal respects the ship itself but it renders recovery under it impossible unless the *Gul Djemal* is held not to be immune.

Constructively the vessel remained here in possession of the sovereign in whose behalf security was given by agreement in order to obtain from this Court a final decision of the new and important international questions involved while not waiving the vessel's immunity or keeping her tied up at great expense and loss.

5. *The Subsequent Proceedings prior to the Decision below.*

On November 19th, 1921, appellant, as master, filed, by one of his proctors, a special claim, again asserting

the Turkish Government's ownership and possession and praying,—

> "to defend accordingly, *without prejudice to the claim of immunity of the* GUL DJEMAL *from suit heretofore asserted by the Turkish Government, a foreign sovereign*" (Ib., p. 29; fols. 87, 88; our italics).

On the same day (Nov. 19th), pursuant to the agreement of the respective proctors, the master filed an answer (p. 31, seq.) claiming the vessel on behalf of her owner, admitting, for purposes of litigation, the rendition of services and their value, but once more denying that the ship was within the Court's jurisdiction; and making this, as certified by the Court, the sole issue (p. 32; fols. 95, 96; pars. Fifth and Sixth).

It is only when a defendant pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived.

> *Harkness* v. *Hyde,* 98 U. S. 476;
> *Yanuszauckas* v. *Mallory S. S. Co.,* 232 Fed. 132.

Giving a bond to release property from illegal attachment does not waive a good objection to jurisdiction if it be renewed.

> *Cricket S. S. Co.* v. *Parry,* 263 Fed. 523, 525.

General appearance is a matter of intent which must be clear and unequivocal.

> *Dahlgren* v. *Pierce,* 263 Fed. 841, 846.

In a somewhat similar case—

> *The Oliver American Trading Co., Inc.* v. *The Government of the United States of Mexico* et al. (decided Oct. 11, 1893, Sou. D. of N. Y.)

it was said that the

> *"clear intendment when fairly construed, is that the appearance was special and designed to raise the questions of immunity presented by their motions"* (Mss. opinion, pp. 9, 10).

6. *Opinion of the District Court.*

On January 7th, 1892, Knox, D. J., rendered the opinion referred to *supra* (p. 39).

On April 19th, 1922, the final decree was entered (p. 43).

7. *The Appeal.*

On June 22nd, 1922, this appellant still *"appearing herein* (and being allowed so to appear) for the interests of the *Turkish Ottoman Government, said owner of the* S. S. GUL DJEMAL *and especially for the purpoes of claiming immunity and for no other purpose,"* filed the assignment of errors and prayed allowance of the appeal, which was granted (pp. 45, 46).

Finally, *on June 23rd, 1922,* the District Judge, pursuant to the Judicial Code, Section 238, filed the certificate above quoted (Ib., p. 48; fol. 144), and made it part of the record.

Thereupon the special claimant filed his assignment of errors.

8. *Assignment of Errors.*

Error is assigned as follows:

First: The Court's failure to hold as a matter of law that the said vessel owned, manned, operated by and in possession of said Turkish or Ottoman Government, a foreign sovereign government at peace with our own, was not subject to the Admiralty and Maritime jurisdiction of the United States District Court.

Second: The holding that the said steamship was not immune from process of arrest.

Third: The rendition of a decree for the libellant.

Fourth: The failure to dismiss the libel. (Record, page 47.)

9. *The Questions Arising in this Court upon the Foregoing Record are:*

First: Was the sole issue, that of the *Gul Djemal's* immunity from seizure as a vessel owned, possessed, operated and controlled by a foreign sovereign without that sovereign's consent, appropriately presented to the Court.

Second: Did the *Gul Djemal,* because she was chartered to a private person for a commercial voyage, forfeit the immunity granted by international comity to naval vessels in the ownership, possession, operation and control of their sovereigns and subject to their orders in public service.

Third: Did she forfeit that customary immunity because diplomatic relations were suspended between the United States and Turkey, without declaration of war and during a state of peace.

POINT I.

The issues were appropriately presented below. Every fact having been agreed upon and only a question of law being before the Court, a direct suggestion from the Department of State to the Court as to how that question should be decided was not requisite or customary and might not have been "appropriate".

The executive branch of the Government having been advised of the matter, objection on its part to establishment by the Court of the Gul Djemal's *right to immu-*

nity under rules of evidence and according to recognized principles of international law and comity will not be presumed.

The function of a suggestion by the State Department to the Attorney General that a sovereign's property has been seized, and by the Attorney General to the Court with a request that the property be released, is or was *ab origine* to place before the Court uncontradictable evidence of a foreign sovereign's ownership. Here that ownership and sovereignty were admitted and found by the Court. No certificate of executive officers was needed to say an undisputed thing in a still more solemn way.

There seems to have been general misapprehension, until recently, by both Bench and Bar, of the procedure in such cases. It has been said that the method of establishing the fact of national ownership before the Court was comparatively immaterial so long as it was established.

Long v. *Tampico,* 16 Fed. 491.
The Maipo, 252 Fed. 627 (and cases cited).

This is presumably still true. But if the proof in a given case is proffered, not by the judicial method of adducing testimony contradictable by the adverse party, but by executive suggestion after diplomatic negotiations, then the formalities must be strictly followed, viz: a suggestion by a diplomatic representative to the State Department, by the Department to the Attorney General and by him, or by proper law officer under his direction, to the Court, with a request for the vacating of process; for it seems that direct diplomatic "suggestions" and even executive "suggestions" without such a request are *vox et praeterera nihil,* suggestions and nothing more.

The Pesaro, 255 U. S. 216.
The Attualita, 238 Fed. at 911, Par. 4.

Lately this Court indicated—without saying that they excluded every other—three ways by which application may be made for the release of a sovereign's property from arrest made without his consent and for questioning the court's jurisdiction:

First, by the sovereign's appearance as a suitor.

Second, by the appearance, with his sanction, of his duly accredited and recognized representative as a suitor.

Third, by making his claim a matter of diplomatic negotiations.

> *In re Muir* (Master of the Gleneden), 254 U. S. 522.

The second method seems under the circumstances the only one applicable here. For sovereigns or their ambassadors who represent the sovereign's persons, to appear as suitors, would seem to imply that their testimony might be subject to contradiction, their veracity impugned. That might present an embarrassing political situation. So even might dispute of the veracity of lesser diplomats. The mere allegations of the British Embassy's counsel appearing as *amici curiae in re Muir* (*supra*), were held to be insufficient evidence.

In this case at Bar, however, the sovereign owning the *Gul Djemal* had no formal diplomatic representative here. But it did have in the appellant an officer of its navy and master of its ship a representative by law, and the custom of the sea, sufficiently accredited to enter its protest against seizure of its property.

The question arises:

Was this appellant authorized to make a special claim for or protest against violation of his sovereign's immunity?

Every master has a general agency for the owners. His special property in the ship, her cargo and freight, authorize him to bring in his own name actions which the owners and others may have in relation to the ship: by parity of reason he may defend the owners and his own rights.

Indeed, it is usually the master of a vessel who, as custodian for the owners, claims her when she is freed from arrest, and a bond is filed in her place. In many courts formal delivery is made by the marshal who has the vessel under arrest to the master when she is freed.

> *Benedict's Admiralty,* Sec. 313 (Ed. of 1910)
> *Disney* vs. *Furness,* 79 Fed. 810
> *Jacobsen* vs. *Dalles P. & A. Nav. Co.,* 93 Fed. 975

In *The Santissima Trinidad,* 7 Wheat. 283, *supra,* a Spanish Consul libelled that ship to recover property alleged to have been taken piratically by armed ships commanded by persons assuming to be citizens of the United Provinces of the Rio de la Plata, then a revolting Spanish colony, and brought as prize to Norfolk, Va., by the *Trinidad.* Her captain, James Clayton, claimed immunity for his ship as a public vessel. On this point the Court said, by Story, J.:

> "It is not understood that any doubt is expressed "as to the genuineness of Captain Clayton's com- "mission, or as to the competency of the other proofs "in the case introduced to controvert it. The only "point is whether, supposing them true, they afford "satisfactory evidence of her public character. We "are of opinion that they do. In general, the com- "mission of a public ship, signed by the authority "of the nation to which she belongs, is complete proof "of her public character * * * The commission, so "far at least as foreign courts are concerned, imports "absolute verity, and the title is not examinable" (at p. 335).

In that case there appear to have been no suggestions from executive departments, and here there is no dispute of Lutfi's commission.

From all these cases it would seem to follow in the instant case that since the captain and second officer of the *Gul Djemal* are concededly officers of the Turkish navy, and since the vessel itself is a naval transport, i. e., a war vessel, therefore the Master, being by his commission the accredited agent of the owner, his sovereign, has the same right as had Captain Clayton to prove the sovereign's claim of immunity without intervention of the executive officials of the United States.

The facts conceded by the stipulation are adequate, and being uncontroverted are *conclusive* evidence that Lutfi Bey was his sovereign's duly accredited representative or agent, at least within the usual province of a ship's master.

It was therefore error to hold the *Gul Djemal* subject to the Court's jurisdiction because of the absence of appropriate suggestion from the State Department.

The sovereign's consent to have his property seized cannot be implied. Indeed the previous record shows that Turkey did not consent.

The master being authorized to make the claim to possession of the ship, what better evidence can there be of a ship's status than the deliberate agreement of adverse parties as to the facts, when each is free, as here, to traverse or challenge his adversary's allegations.

Upon so important a question of whether a government exists, the New York Court of Appeals said recently:

> "Here, however, we need no proof. The fact is conceded."
>
> *Wulfsohn* v. *Russian Socialistic Federated Soviet Republic,* 234 N. Y. 372; 374.

so, also, in

Russian Republic v. *Cibrario*, 235 N. Y. 255.

the effect of nonrecognition of the plaintiff by our government being under consideration before the same Court it said (at p. 262):

> "The plaintiff concededly has not been so recognized. There is therefore no proper person before us."

In *re Muir, supra*, the concession that the *Gleneden* was not an armed ship of war and not owned by a private government but by a private corporation was accepted as evidence in this Court.

"So far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and against its property;" as was said in *Hassard* v. *U. S. of Mexico, et al.*, 29 Misc. (N. Y.) 511; 512; afd. on opinion below 46 A. D. 623; afd. 173 N. Y. 645.

In that action attachment issued against defendants' property. The United States District Attorney, disclaiming any authority from defendants appeared as *amicus curiae*, instructed by the United States Attorney General and moved to vacate the process, upon the ground that the Court had no jurisdiction and that to assume it might involve political complications. The motion was granted, the Court citing:

> *Stanley* v. *Schwalby*, 147 U. S. 508; and
> *United States* v. *Lee*, 106 U. S. 196.
> Cf. *Russian Republic* v. *Cibrario*, 235 N. Y. 255, 261.

In *The Luigi*, 230 Fed. 493 a case wherein a ship requisitioned by the Italian Government was held not immune when her master had appeared and claimed her *for her owners, private individuals*, and had filed

a bond by them and so released her, it was said by the Court at page 496:

> "It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, because such a suit would be inconsistent with the independence and equality among the nations of the State which he represents, than it is to take cognizance of private rights if by so doing that rule is violated" (at p. 496).

The Court further said that if by the attachment its authority were indirectly exercised upon the Italian Government the writ should be quashed; but the private owners, by giving the bond, had converted the suit into one between private individuals, had alone become parties as obligors, and had done for the Italian Government all that would have been obtained by vacating the attachment.

In the case at bar, security has not been given by or for private owners, but in behalf of the Turkish Government by its officer and agent with explicit reservation of its right to assert immunity.

POINT II.

The Gul Djemal, a government naval transport owned, manned and controlled by a foreign sovereign at peace with the United States, did not lose her immunity from seizure because temporarily chartered for a trading voyage while still in the Turkish naval service and subject to orders.

She might have been called back by the Turkish Government to engage in transport service, her primary function, as even privately owned merchant ships were

requisitioned by the belligerents while on voyage: an example of such action in the case of a private vessel is found in the case of

The Adriatic, 253 Fed. 489; afd. 258 Fed. 902.

It is the settled American rule that a foreign war vessel of a nation with which we are at peace is exempt from execution of process.

The Exchange, 7 Cranch 116.

It is not held by that or by any other American or English ruling case that a public government vessel loses immunity because temporarily engaged in trade while still in governmental ownership, possession and control and subject to orders. In *The Pesaro,* 277 Fed. 473 (discussed *infra*) a contrary view is expressed. Other Federal, Circuit and District judges have held distinctly and with substantial unanimity that the sporadic use in trade of a foreign government's naval vessel, while still in public ownership, possession and operation, does not forfeit its immunity.

The Pampa, 245 Fed. 137.
The Maipo, 252 Fed. 627.
The Carlo Poma, 259 Fed. 369, 371.
The Maipo, 259 Fed. 368.
Moore & McCormack Co. v. *Hesslein (The Sargento Albuquerque),* 255 Fed. 46.

The English doctrine as stated in the ruling case of

The Parlement Belge, L. R. 5 P. D. 197.

and emphasized in

The Porto Alexandre L. R. (1920), p. 30,

is explicit, broader than the American rule in that it makes ownership alone the test of immunity, especially

interesting as adopting the reasoning of the American case of *Briggs* v. *Light-ships,* 93 Mass. (11 Allen) 157, and particularly in point as disapproving the theory ably advanced by Sir Robert Phillimore in

The Charkieh L. R. 4 A. & E. 59 (1873)

that a sovereign, by engaging in trade, forfeits his and his vessel's immunity.

In the last case, immunity from process was claimed for the *Charkieh* as a ship of the Egyptian navy under the Khedive's sovereignty. She ran as a packet between Alexandria and Constantinople, carrying cargo, mails and passengers. Going to England for repairs, she carried thither and advertised to carry back cargo. Sir Robert Phillimore held that the Khedive was not a sovereign, and, therefore, his vessel was not immune. His further proposition that even if the Khedive were a sovereign, the ship's immunity would be forfeited by its employment in trade, would seem to be *obiter dicta;* at all events it was disapproved in—

Mighell v. *Sultan of Johore* (1894 1 Q. B. 149-154)

and over-ruled by

The Parlement Belge (L. R. 5 P. D. 197)
Cf. *The Constitution* (L. R. 4 P. D. 39)

In the case last cited, a United States naval vessel carrying to New York American exhibits in the Paris Exhibition of 1867, was held by Sir Robert Phillimore immune from libel for salvage; (a claim subsequently paid by our government as a *moral* obligation—Davis; The Elements of International Law, new edition, pp. 81, 82).

Cf. *The Jassy,* 1906 Probate 270
Cf. *The Gagara,* 1919 Probate 95

The *Parlement Belge* has been recognized as the ruling English case, and its doctrine accepted in decisions of our Federal Circuit and District courts; subject to the addition of governmental possession, as a ground of immunity, to that of ownership (*The Maipo, The Pampa, The Carlo Poma,* et al, *supra*).

As said above, one American opinion, apparently accepting Sir Robert Phillimore's views, in *The Charkieh,* as to what the law should be is that of Mack, C.J., in

Luzzato & Son v. *S. S. Pesaro,* 277 Fed. 473
(D. C., S. D. N. Y., p. 41; fols. 121-123)

That case was followed by Knox, D.J., in deciding the instant case but the two are readily distinguishable. The *Pesaro* had been released by the District Court upon the Italian Ambassador's direct suggestion. This Court reversed that decree, on direct appeal, saying that, apart from the suggestion, nothing pointed to absence of jurisdiction, while the statements in the libel pointed to its presence. The Court said:

> "The terms and form of the suggestions show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion, and invite the Court to give effect to it. He called it a 'suggestion' and we think it nothing more."

So saying this Court sustained the assignment of error that the suggestion should have come through official channels of the United States and left the allegations of immunity to be established "in an appropriate way."

The Pesaro, 255 U. S. 216.

The merits of the case were then brought to trial, as in the instant case, upon stipulation which conceded that the vessel's master, officers and crew were civilians, "*not*

under the orders of or connected with the Italian naval or military forces'', not on the Italian naval roster, nor under the immediate direction of the Department of the Italian Government having to do with naval and military affairs, and that she was regularly engaged in trading. It was also consented that there might be read in evidence an Italian advocate's opinion that under the law of Italy the ship would not be immune from process of Italian courts.

The trial judge, being apparently of the opinion that the nature of the service in which a vessel is engaged *at the time of the cause of action's accrual, or of arrest,* is the test of immunity rather than the sovereign's possession and the vessel's general purpose,—held that the *Pesaro* was an ordinary merchant vessel and therefore not immune from arrest.

The Court said, 277 Fed. at 482:

> ''Especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States.''

and then, indicating doubt as to this ruling, added:—

> ''But if I err in believing that the accepted law of this country does not require a holding that merchant vessels owned and operated as such by a foreign sovereign state are, therefore, exempt from seizure, the *Pesaro* would nevertheless not be entitled to immunity''; (Ib., p. 482; par. 4), the reason for this conclusion being that ''the fact that the steamship *Pesaro* itself is subject to the ordinary processes of the Italian Court would seem to be *vital and decisive.* There is no reason of international comity or courtesy which requires that Italian property not deemed *extra commercium* in Italy, should be treated as *res publica* and *extra commercium* in the United States'' (Ib., p. 483; par. 1).

Such being the ''vital and decisive'' fact upon which *The Pesaro* on its latest voyage through the courts was

decided, the other propositions as to which the learned judge thought error possible, may fairly be regarded as *obiter dicta.* There is no suggestion in the case at Bar to the effect that Turkish Courts would not grant immunity to American Government vessels.

The Pampa, an Argentine naval transport commanded by naval officers with a crew of enlisted men, brought to the port of New York under commercial charter a general cargo and was libelled for collision. After arrival she received orders to carry back artillery and munitions of war. The Argentine *chargé d' affaires ad interim* personally appeared in court to suggest the vessel's immunity. The Court ordered her release, quoting with approval from the opinion in *"The Attualita"* (238 Fed. 909, 911), this excerpt:—

> "For actions of the public armed ships of a sovereign, and of those, *whether armed or not, which are in the actual possession, custody and control of the nation itself, and are operated by it,* the nation would be morally responsible, *although without her consent not answerable legally in her own or other courts"* (our italics).
>
> *The Pampa,* 245 Fed. 137.

In

> *Moore & McCormack* v. *Hesslein* involving *The Sargento Alberqueeque,* 255 Fed. 46

it appeared that libellants, agents of a South American line, contracted to carry merchandise on a specified boat, which failed to appear in time to load. Libellants tendered in her place the steamship *Sargento Alberqueeque,* a Brazilian naval transport, which respondents declined to accept. The Circuit Court of Appeals, reversing the District Court, held that this was not a proper tender, and said at page 48:

> "She was a transport of the Brazilian navy commanded by a lieutenant of that navy. The shipment if made would have been in the possession of the Brazilian Government, and if it had been damaged or lost the respondents could not have proceeded against the Brazilian Government, it being a sovereign, *in personam*, nor against the steamer *in rem*."

It is not our purpose to expand the brief unduly by long excerpts from decided cases; nor to discuss at length cases like *The Attualita, The Adriatic, supra,* and others wherein a government's immunity has been claimed for privately owned ships like the *Gleneden* under requisition; for the *Gul Djemal* was not under requisition by but concededly owned and possessed by the Turkish Government. We may, however, note in passing,—

The Roseric, 254 Fed. 154.

There, after reviewing the cases, the Court approved the opinion of Judge Gray, later a Justice of this Court, in

Briggs v. *Light Boats,* 93 Mass. (11 Allen) 157-163.

that immunity existed not for war vessels only but for those that are (italics ours) "instruments of sovereignty and *does not depend on the extent or manner of their actual use at any particular moment but on the purpose to which they are devoted.*"

This, as already said, was the view approved and adopted in *The Parlement Belge, supra.*

The *Gul Djemal's* purpose was to serve as a transport in the Turkish navy. When arrested, she was still in that Government's ownership and control. *Although temporarily under a commercial charter, the purpose to which she was devoted was that of a naval transport.* To that service she could have been called at any time.

It is submitted that the substantially unanimous judicial opinion up to the present time is well expounded in

> *The Maipo,* 252 Fed. 627, *supra,* Cf. 259 Fed. 369.

That vessel was libelled for damages to hides brought by her from Montevideo to New York under a commercial bill of lading of the usual character. The Chilean *chargé d'affaires* through proctors "appearing specially for the Chilean naval transport *Maipo*," suggested directly to the District Court that the vessel—

> "was and now is owned by the government of the republic of Chile, being a transport in its navy and in the possession of the Government of Chile in the person of a duly commissioned officer of the navy, the master of said steamship, and wholly manned and operated by a crew employed and paid by said government."

So far the facts are substantially those in the instant case.

An additional statement that she was "to carry back to Chile a cargo belonging to the Chilean Government," was disregarded by the Court under an agreement between proctors (Ib. p. 628). The suggestion was accompanied by a certificate of the Secretary of State that the *chargé d'affaires* was duly accredited; but, so far as appears, it did not state that the vessel was the property of Chile or ask for its release. Judge Mayer said:

> "I shall assume because of the facts *infra,* that while the Chilean Government is not directly trading, it is in effect using or permitting the vessel to be used for commercial purposes" (p. 628).

(No more can be assumed against the *Gul Djemal*). • • • Judge Mayer said further:

> "Even though the vessel was chartered by a private person for hire, and that private person contracted for freight for his personal profit" (the *Gul Djemal's* case) "it might be argued with much force, that nevertheless the vessel was used for a governmental purpose, in so far as it enabled Chilean shippers to export their products to the United States and to bring back from her to Chile, commodities needed by the people there" (Ib. p. 629).

Finding *The Parlement Belge* (*supra*) to be the ruling English authority, the opinion concludes that under our law when ownership and possession are both present, as they are in the instant case, the *res* is immune. *The Davis*, 10 Wall 15, was cited.

Later, in another libel of the same ship,

The Maipo, 259 Fed. 367,

Hough, C. J., agreeing with Judge Mayer's ruling, said:

> "Why was a war vessel exempt from seizure? Not because it was a war vessel, but because it was a part of the exercise of or manifestation of sovereign power. Why is any other vessel exempt? For the same reason, just as the sovereign himself is exempt" (pp. 367, 368).

In *The Carlo Poma*, 259 Fed. 369, 371, *supra*, the Second Circuit Court approved the conclusions in the *Pampa* and *Maipo* cases.

It is true that the decree on that appeal was vacated, but solely on the procedural point that the appeal lay directly to this Court.

The Carlo Poma, 255 U. S. 219.

None the less, the Circuit Court's opinion expresses the substantially unanimous view taken of the substantive

law by the Federal judges who have passed upon the question, in these words:

> "The appellant contends that a vessel of a foreign sovereign not being a war vessel or at the time performing public duties but engaged in carrying cargo commercially is not entitled to immunity from suit. The English Courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another." *The Parlement Belge*, Law Reports 5 P. D. 197; *The Jassy* (1906), 270. "The law of the United States is the same, except that the immunity of property of a sovereign depends not merely upon the ownership but also upon the actual possession by the sovereign of the property at the time process is served" (at p. 376; citing *The Davis*, 10 Wall 15; *Long* v. *The Tampico*, 16 Fed. 491. *The Attualita*, 238 Fed. 909; 152 C. C. A. 43).

The *Carlo Poma* was libelled for damage to 10712 boxes of lemons. The Italian ambassador suggested directly to the Court that the vessel was owned by his Government, registered in the name of the Italian State railways, a branch of that Government, in the Government's possession in the person of a master paid by the Government and operated by a crew employed and paid by the Government for which it was to carry back a cargo. The suggestion was accompanied by the Secretary of State's certificate that the Ambassador was duly accredited. There was no allegation that the vessel was, like the *Gul Djemal*, a naval transport in command of naval officers.

Assume that in *The Maipo, The Pampa, The Carlo Poma,* and other like cases, there had been stipulations such as the one here; would not they have been appropriate presentations of the facts and would not and should not the courts have disclaimed jurisdiction, as in fact they did, without any request from the "official channels" of

the Government, a request, by the way, which does not appear in several of the cases.

There may be differences of opinion as to the desirability of allowing immunity to government owned and possessed ships engaged directly or under charter, in peaceful trade for revenue, the collection of which is a governmental function as beneficent, necessary and important as, and far less costly and harmful than making war in order to annex territory or to resent an affront. But there is not any doubt as to the fact that the weight of decision is in favor of immunity.

A sovereign may conduct a railroad for profit.

> Mason *vs.* Intercolonial Ry., 197 Mass. 349;
> Cf. Ballaine *vs.* Alaska Northern Ry. Co., 259 Fed. 183 (U. S. Intervener and cases cited).

On the same principle he may carry on a steamship line if he deems it wise and advantageous so to do.

The likelihood that governmental competition will ever seriously injure private traders because of the immunity here claimed is negligible. Shippers would not ship, nor would underwriters insure cargo on vessels immune from liability. The same is true regarding the furnishing of materials by material, supply and repair men. They would have a moral claim against the Government owners, which might be met as was that against "*The Constitution*" (supra).

Much more likely and practical would be the precautions taken by such persons to require cash payments or security from immune vessels. Be all these hypotheses as they may, they are merely arguments *ab inconvenienti*, and not justiciable. It is within the province of the legislative and executive branches of the government to anticipate and provide remedies for them. It is not with-

in the judicial province to depart from established principles of international law and comity in order to mollify hardships whether actual or suppositional.

That the remedy is not in the courts is clearly expounded by Lord Justice Scrutton in the salvage case of

The Porto Alexandre, L. R. (1920), p. 30.

Hill, J., sitting in the first instance, reluctantly, and disregarding his personal views, set aside the writ as to the ship and freight, because they were shown to be property of the Portuguese Government, but sustained it as to cargo. He said:

> "I have already in previous cases pointed out what I conceive to be very strong reasons why it is undesirable that cases should be withdrawn from the courts, but I have only to assert what I conceive to be the law" (p. 31).

On appeal, Bankes, L. J., said (p. 33):—

> "I gather from the judgment of Hill, J., and from what has been said by learned counsel, that this question (i. e. the immunity of a sovereign's vessels engaged in trade), is becoming one of growing importance. In the days when the early decisions were given, no doubt what were called Government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times, sovereigns and sovereign states have taken to owning ships which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. This fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest." (Cf. Hough's opinion, *supra,* in *The Maipo,* 259 Fed. 369).

Then noticing briefly some opinions in earlier cases, that the service in which the ship is engaged at the time should be the test of her immunity, (the view of Mack,

C. J. in *The Pesaro,* 277 Fed. supra), he accepted the law, as laid down in *The Parlement Belge.*

Without further citing authority, we are content to rest the construction of the English rule upon *The Parlement Belge* and *The Porto Alexandre,* emphasizing the fact that Warrington, L. J., concurring in the latter case, quoted *Brett, L. J.,* in the former as expressing and approving the result of the American case of *Briggs* v. *Light Boats* and founding his conclusion upon it. That opinion was rendered, as already said, by Judge Gray, later Mr. Justice Gray of this Court. Narrow the English rule by including in the tests of immunity, governmental possession as well as ownership (*The Davis, The Carlo Poma, The Pampa, The Attualita,* all *supra*) and we have the rule applicable to the stipulated facts in the instant case, viz:—

that at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal,* the *Gul Djemal* was owned (Record, fol. 10) and in the possession of the Turkish Government (R., 36; fol. 108).

The Executive Branch of the United States Government was aware of the *Gul Djemal's* arrest, a fact of which it might have taken cognizance, even if not specially advised of it. Seizure of a foreign government's vessel in time of peace is, at least, an unfriendly act; at most, a *casus belli.* In the absence of executive objection it is the function of the Courts to administer well established rules of international law and comity. It is the function of the Executive Branches, especially at critical moments, to see that peaceful relations shall not be disturbed. The Courts should no more assume executive objection to the release of a vessel than they should assume, without expression thereof or waiver, a sovereign's consent to be sued. If the executive may think it best not to ask the Courts to vacate process in such cases, it may abstain from active interference.

Silence speaks consent, not objection. If on the other hand the Executive Branch feels that the seizure of a friendly government's ships may precipitate hostilities or retortions, it may *sua sponte, with no suggestion from the aggrieved government* appear before the Court, by a proper law officer, and ask vacation of process. This was the course adopted in

Hassard *v.* United States of Mexico, et al., 29 Misc. N. Y. 511, afd. 173 N. Y. 645, *supra.*

There the United States District Attorney of the Southern District of New York, General Burnett, appearing in the State Court under instruction of the Attorney General of the United States, and expressly disclaiming representation of the defendants, moved to discharge an attachment of their property and to dismiss the action, stating, as shown by the appeal papers, the danger of such a proceeding against the property of a government at peace with our own. In the very recent case of

Oliver Trading Co. *v.* Mexico, *supra,*

the Court also held decision in abeyance, awaiting advices from the Department of State, and eventually vacated process and dismissed the complaint although, so far as the opinion shows, the Department only advised that a revolutionary government in Mexico had been recognized, that Mexico had never ceased to be an "international person," and that diplomatic relations were about to be restored without, however, making specific requests for action by the Court. In other words, the function of the executive seems to be to advise the Court that an alleged sovereign is in fact a recognized sovereign; in amity, as was done in

Mighell *v.* Sultan of Johore, *supra.*

Such information being given it is for the Court to administer the law. In this way neither branch of the government encroaches or appears to encroach upon the jurisdiction of the other. But if, as here, that sovereign's ownership and possession of seized property are conceded, and so proved without dispute or objection, the question of its immunity is one of international law for the Court.

POINT III.

The suspension of diplomatic relations between Turkey and this country, while they remained at peace with each other, did not abrogate the comity of nations or render the "Gul Djemal" subject to seizure.

THE PRINCIPLES APPLICABLE.

Rights and immunities of sovereignty can be abrogated only by treaty or by legislation; in such a case as this at Bar, for example, by an act of Congress providing that foreign government-owned vessels entering our ports for commercial purposes shall be deemed to have in all respects the status and liabilities of privately owned vessels; for Congress can, of course, if it so wishes, either exclude foreign vessels from our ports, or prescribe the terms on which they shall come in.

> *Patterson* v. *The Bark Euroda,* 190 U. S. 169.
> *Cf. The Exchange,* 7 Cranch 116.

But until such treaty be made or such legislation is enacted, the well settled rules of international law applicable to members of the society of nations prevail, because, as Chief Justice Marshall said in *The Exchange, supra,* the leading case on this subject, at page 146 (italics ours):

"It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. *But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals,* which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, *ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.*"

It was further said in *The Exchange* at page 135 (cited by Cockburn, C. J., in his judgment at the Geneva Arbitration, and cited in Sir Edward Creasy's "First Platform of International Law," p. 44):

"A nation would justly be considered as violating its faith, although that faith may not be expressly plighted, which should suddenly and without previous notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."

In *The Exchange* there was no ruling upon the question whether a public war vessel loses immunity by an adventure in trade. The question was not before the Court. It now comes here "important and new."

In re Hussein Lutfi Bey, 256 U. S. 616, *supra.*

It may be noted that the great chief justice in the above excerpt spoke of this immunity as "a principle of public law." It is also referred to as a rule of "comity"; i. e. of "customary" or "voluntary" law.

International law has been defined variously. Perhaps as good a definition as any is that by Professor Geo. B. Davis in his "Elements of International Law" (editions of 1900 & 1916, page 3; also at p. 948 of his earlier work, "Outlines of International Law," 1888):

> "That body of rules and limitations which the sovereign states of the civilized world agree to observe in their intercourse and relations with each other."

"Comity" he defines (quoting from Sir Edward Creasy's "First Platform of International Law," p. 36; and citing Halleck, Woolsey, Pomeroy, Hall, Twiss, Phillimore and Walker) as "a set of courteous and convenient observances, usually followed in the conduct of states towards each other, too definite, and often too minute and conventional, to make it proper to call them moral principles. The violation or neglect of these is not considered sufficient in itself to justify war, though one state is, by such violation or neglect, often placed in an attitude of avowed ill-will and suspicion towards another state" (p. 122).

Mr. Webster defined "comity" as

> "in general terms the doctrine, that there are, *between nations at peace with one another*, rights both national and individual resulting from the comity or courtesy due from one friendly nation to another" (Works, vol. 6, p. 117—our italics).

Whether a rule is one of comity or of international law seems to depend upon how long the custom affected by it has existed.

Thus it has been said by this Court:—

> "The word 'comity' was apparently used by Lord Stowell in the Young Jacob and Johanna, (1 C. Rob. 20) as synonymous with courtesy or good will. But the period of a hundred years which had elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule or international law."
>
> *The Paqueta Habana*, 175 U. S. 694.

So Chief Justice Marshall, while saying that the slave trade was contrary to the law of nature and prohibited by the laws of most civilized nations ruled, nevertheless, that

> "This (the trade) which was the usage of all could not be pronounced repugnant to the law of nations which is certainly to be tried by the test of general usage. That which has received the assent of all must be the law of all."
>
> *The Antelope*, 10 Wheat 120, 121.

It may well be argued that the rule of comity which prescribes that a sovereign cannot be brought into court or his property taken without his consent, in time of peace, is so old, so well recognized by usage of members of the society of nations, as to have ripened into international law, which is "part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

Hilton v. *Guyot*, 159 U. S. 113, 163, 164.

Some of the reasons that have been assigned for suspending diplomatic relations could scarcely be as-

signed as reasons for abrogating comity or international politeness, as for instance "to further the cause of peace."

(International Law Situations and Topics of Discussion, 18 XVII, p. 71) and others in the list of relations suspended during the World War (Ib. 16).

The United States has not been slow to ask the recall of and even to dismiss diplomatic representatives, notably Mr. Crampton, the British Envoy, for alleged recruiting of men for the British Army in the Crimea. (Moore's Int. Dig. vol. 2, p. 3621; vol. 4, p. 553; vol. 7, p. 822; Op. Atty. Genl. vol. 7, p. 367).

The recall of the British Minister, Mr. Jackson, was also requested because of his offering offensive toasts at dinners and charging our government with "falsehood and duplicity." There are also the cases of Sackville-West, Catacazy, and others; so that it is said that the United States "has had the misfortune to supply almost all the modern instances in which a government has felt itself unable to continue relations with a minister."

Hall's International Law—Ed. 1917, pp. 315 *seq.*

In 1848 a controversy between the Duque de Sotomayer, Spanish Minister of Foreign Affairs, and Mr. Bulwer, British Minister, led to a suspension of diplomatic relations for two years (Satow's Diplomatic Practice, vol. 1, p. 378). In none of these cases do we find that the usual rules of comity were abrogated to the extent of seizing a sovereign's public vessels or barring ports to their entrance. We can find no specific discussion of the effect of interrupting diplomatic relations. It may lead to war or even be deemed a *casus belli*,—and it is quite conceivable that if, during such an interruption of civilities, one nation should seize another's vessel, retorsious and reprisals might be resorted to, and, if the vessel first seized were libelled and sold, her sovereign owner might forcibly retake her in his waters or on the high seas with resulting war.

A more extended inquiry into the effect of interrupting diplomatic relations would lead to writing a speculative treatise instead of a brief. Two recently adjudicated cases may however be referred to:

> *Wulfsohn* vs. *Russian etc. Republic,* 234 N. Y. 372, *supra.*
>
> *Russian Socialistic etc. Republic* vs. *Cibrario,* 235 N. Y. 253, *supra.*

In the former case, on appeal from orders denying a motion to vacate an attachment, the New York Court of Appeals held that our courts would not take jurisdiction of an action against an existing foreign government, whether recognized or not; that its existence was a matter of fact, which, *if conceded,* was sufficiently established to divest jurisdiction, and that courts could not bring the sovereign before them, "*not because of comity* but because he has not submitted himself to our laws. Without his consent he is not subject to them." (Citing at p. 376, *The Exchange* and other cases.) (Our italics.)

That ruling applies to the case of the *Gul Djemal.*

In the *Cibrario* case it was held that an unrecognized foreign power could not bring an action in our courts; that its power to do so is the creature of comity which is born of "recognition", and is "that reciprocal courtesy which one member of the family of nations owes to the other."

It was also held in that case, that the question was political and out of the court's jurisdiction and also (at p. 261) that, following

> *Oetjen* vs. *Central Leather Co.,* 246 U. S. 297; 303.
>
> "The principle that the conduct of one independent government cannot be successfully questioned in courts of another is as applicable to a case involving the title to property brought within the custody

of a court such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency."

Now, if the reasoning be sound, that where recognition exists and peace exists comity also must exist, then it follows necessarily that mere interruption of diplomatic relations not accompanied by war does not abrogate comity as the learned court below held.

War sanctions the seizure of enemy vessels. Severance of diplomatic relations by two sovereigns does not authorize one to seize the other's property. So to do would lead inevitably to retorsions, reprisals or war.

Counsel for the *Gul Djemal* submit that it would be a very dangerous doctrine to hold that a breach of diplomatic relations not followed by war abrogates the respective rights of the governments involved, and justifies their courts in disregarding the ordinary international immunities and privileges, included in the rule of comity.

A breach of diplomatic relations should, on the contrary, cause the courts and the executive to act with more than usual circumspection, in order to avoid bringing on war or the aggressive acts just short of war between the nations affected.

Applicability of the Above Principles to the Facts of the Case at Bar.

In November, 1914 Turkey became Germany's ally in the late war, and intrusted her interests in Great Britain to the good offices of the American Embassy at the Court of St. James.

In the same year she suspended relations with Belgium, an act which, as M. Davignon, Belgian Minister of

Foreign Affairs, wrote to the Turkish Minister in sending him his passports, the Belgian Government interpreted as in no way implying a state of war.

(International Law Situations, Topics and Discussions, Vol. XVII, p. 69, published by Naval War College.)

Thereupon Belgian interests were intrusted to the American Ambassador at Constantinople.

On February 3d, 1917 the United States severed relations with Germany, Turkey's ally, but not with Turkey; and on April 8th declared war on Germany; that constituted a recognized ground for Turkey's severing diplomatic relations, as she did, on April 20th, following, but without declaring war; on the contrary she, as here stipulated, ordered her people to observe American rights; the interests of the United States in Turkey being entrusted to the Swedish Legation at Constantinople, those of Turkey in the United States to the Spanish Ambassador at Washington.

Following the Armistice in 1919, American interests in Turkey have been represented, as here stipulated, informally by an American High Commissioner and those consuls who returned to their posts.

(Letter of Department to appellant's counsel, page 63 of record in re Lutfi Bey, 256 U. S. 616. Also Department's public statement on August 5th, 1923, when releasing to the press for publication on August 7th a summary of the pending Treaty of Amity with Turkey—"Current History" for October, 1923, p. 100.)

At the time of the *Gul Djemal's* arrest, Turkey remained as she had been for years, a *recognized* sovereign state, an "international person." She was, and now is, a member of the society of nations, to which she was admitted under the Treaty of Paris by the great powers in 1856.

President Jackson promulgated our first commercial treaty with her in 1832, thirty-four years before the

Treaty of Paris; President Grant the Protocol of 1874. Whether the Treaty of 1862 ceased to be operative was disputed.

Notes to Compilation of Treaties by the State Department 1889, page 1372.

But the United States continued to receive most favored nation treatment, and diplomatic relations between the two countries were maintained until April 20th, 1917. "Recognition" of Turkey by the United States is no more needed to establish her status than was recognition of Spain after the Spanish war, or of Great Britain in 1856, after dismissal of her Minister, Mr. Crampton.

"Treaties do not generally *ipso facto* become extinguished by war. Valid rights of property do not become divested."

State Department's Compilation of Treaties, p. 1228, VII, citing *Society etc.* v. *Town of New Haven* 8 Wheaton 464, *Carneal* v. *Banks* 10 Wheat. 182; (but see contrary British position adopfed by President Polk in the Mexican War, same compilation 1237.)

Still less will severance of formal diplomatic relations between two nations, not followed by war, affect their relative status and rights in the family of nations and, between them, abolish the operation of fundamental principles of international law and comity.

Our treaty relations with Turkey continued despite severance of diplomatic relations.

On August 6th, 1923, twenty-five days before the recognition of the new Mexican Government above referred to, a new treaty was signed at Lausanne by representatives of the United States and Turkey. Its preamble recites that its purpose is to regulate the conditions of intercourse between the United States and Turkey and to define the rights of their respective nationals in the territory of the other "in accordance with the principles of international law and on the basis of reciprocity". Both the Turkish and Mexican treaties await ratification.

The abolition of the capitulations alone would have necessitated a new treaty; and the above recital of the preamble differs notably from that of our Treaty with Germany, signed at Berlin on August 15th, 1821, which describes the document as "A Treaty to restore the friendly relations existing between the two nations prior to the outbreak of the war". The implication from this difference is that friendly relations had been severed with Germany but not with Turkey. And the reason for such severance of relations as had existed with Turkey, our declaration of war upon her ally, ceased with promulgation of the peace treaty with Germany on November 11th, 1921, if not with the treaty of Versailles.

Finally on August 7th, 1923 the Department of State released to the press a summary of the Treaty accompanying it with a statement that the United States was not a party to the Treaty of Sevres and although represented at Lausanne upon the invitation of the allied powers, yet *"as the United States had not been at war with Turkey and was not negotiating a treaty of peace with that country, this Government did not become a party to the allied treaty"*.

That summary shows that the United States is assured treatment as favorable as that accorded to any other nation, *Current History*, October, 1923; *Article on The Turco-American Treaty*, page 100 *seq.*

It is submitted therefore that *as we have not been at war with Turkey the suspension of diplomatic relations did not, as the learned Court below held, abrogate in time of peace the accepted rule that a sovereign cannot be sued nor can his property be seized without his consent and the peace of nations thereby vexed.*

The present status seems to be the same as, or better than, that with Mexico. Treaties with each are pending. In principle, neither should be preferred.

POINT IV.

The decree appealed from should be reversed, the process against the Gul Djemal and the bond given for her vacated and she should be declared immune.

Respectfully submitted,

New York, 22d November, 1923.

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